



Morgan Lewis

RESTRICTIVE COVENANTS

What Is Reasonable to Restrict
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Presenters



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Agreements

- Employment Agreements/Offer Letters
- Annual Bonuses/LTIPs
- Equity Grants
- Stand-alone
- Separation/Releases

Types of Restrictive Covenants

- Noncompete
- Customer Nonsolicitation/Nonengagement
- Employee Nonsolicitation/No-hire
- Garden Leave
- Confidentiality
- Intellectual Property
- Nondisparagement

Patchwork of State Laws

- California and several other states prohibit noncompetes
 - Washington DC noncompete ban becomes effective Oct. 1, 2022, unless extended again
- Increasing number of state laws restrict but still allow noncompetes, for example:
 - Illinois
 - Massachusetts
 - Washington
- In many states, still no statutory restrictions on noncompete clauses, which generally remain enforceable if they satisfy certain criteria
- Executive and legislative efforts at the federal and state level, including New York and Connecticut, reflect trend to promote employee mobility

Key Considerations

- Duration
- Geographic Scope
- Subject-matter Scope
- Employees
- Sale-of-business? Partnership? LLC?
- Remedies
- Choice-of-law
- Choice-of-forum
- Remote Workers

Case Study 1



Employer XYZ has been expanding its offices across the United States and routinely requires that all new hires sign XYZ's standard restrictive-covenant agreement, which has not been updated to reflect XYZ's expansion into other states (XYZ started as a Pennsylvania company). The general counsel of XYZ has some concerns about the enforceability of the existing agreements and has asked what can be done to have more current restrictive-covenant agreements now that XYZ has offices across the United States.



Case Study 2



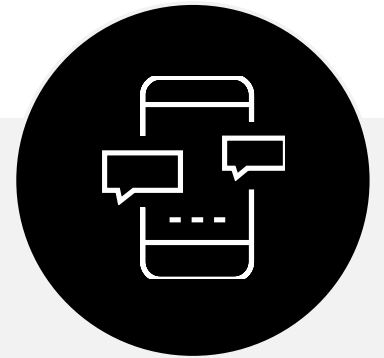
Employer ABC is located in Boston, Massachusetts, but is having trouble recruiting talent in the Boston area to fill many of its key positions. As a result, ABC has started to conduct a national search to fill open positions, and one ideal candidate lives in California. ABC would like to hire this individual, but the individual is not willing to relocate to Boston and ABC is ok with the individual working remotely. However, ABC is in a highly competitive industry and wants this individual to sign a restrictive-covenant agreement.



Case Study 3



Employer DEF is about to acquire Company X, which is located in California. DEF would like to ensure that the two founders of Company X are subject to restrictive covenants in connection with the transaction, or the deal will not go forward.



Case Study 4



Employer KLM is in the process of approving equity grants to its employees and would like to include restrictive covenants in the grant agreements since not all employees have entered into restrictive covenants. Some of the existing covenants are very dated and have not been updated to reflect the changing business of KLM from a regional company to a national company.



Case Study 5



Employer PQR currently has one office location, New York City, but since COVID-19 many of its employees have been working remotely across the United States. As a result of Employer PQR's business, there is no requirement for employees to work in the office and remote working has become the norm. However, since employees are working in many states, including California, Massachusetts, Texas and Florida, Employer PQR is concerned as to whether the existing noncompete to which these employees are bound is enforceable and if anything should be done, especially since there is no expectation to require anyone to permanently return to the office.



Case Study 6



Employer GHI is terminating an executive and is concerned about the executive going to a competitor. The executive has an existing confidentiality and nonsolicitation covenant in her employment agreement and a six-month noncompete in her last equity grant. The executive will be receiving severance as part of the termination, and GHI would like to provide for a longer noncompete in connection with the executive's execution of the release.



Case Study 7



Employer STU requires all employees when they are hired to enter into a standard restrictive-covenant agreement. Also, as a condition of receiving an annual bonus, employees are required to reaffirm the terms of their existing restrictive covenants. Employer STU also includes restrictive covenants in the annual equity grants that employees receive. Employer STU has not been that great at ensuring that the terms of these various restrictive-covenant agreements are consistent, with some containing different restriction periods along with different versions of how restricted business is defined and the relevant geographic location.



Biography



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Gina L. Lauriero advises clients across the spectrum of employee benefits and executive compensation matters. Her practice encompasses designing, implementing, and administering equity, incentive compensation, nonqualified deferred compensation, employment, and severance plans and agreements for public and private companies. When clients undertake mergers, acquisitions, and other corporate transactions, she offers advice on all employee benefits and compensation-related aspects. Gina's recent work has included advising a credit ratings agency on its acquisition of a leading provider of analytical tools and data.

Biography



Siobhan Mee

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Siobhan E. Mee represents companies and individuals in complex employment litigation matters, including noncompetition lawsuits, discrimination cases, and whistleblower actions. She also advises employers in connection with internal and government investigations. Her recent work includes defending a biotech company in litigation brought by its former CEO, who claimed entitlement to a substantial ownership interest in the company; conducting an internal investigation into alleged fraud and other compliance issues raised by a whistleblower; and obtaining injunctive relief against a client's former sales team to prevent its breach of restrictive covenants and misappropriation of trade secrets. Siobhan is the leader of the labor and employment practice for the Boston office.

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Michael Weil

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Michael Weil represents employers in a wide range of employment disputes, with a focus on high stakes noncompete, employee-mobility, and trade-secrets matters arising from a variety of industries, including life sciences, technology, retail, and financial services, throughout the United States. He also regularly handles complex employment class actions as well as single- or multi-plaintiff matters involving a variety of issues, such as wage and hour matters, independent contractor status, wrongful termination, discrimination, harassment, and retaliation. Michael also regularly counsels employers across a variety of industries on complex employment matters.

Biography



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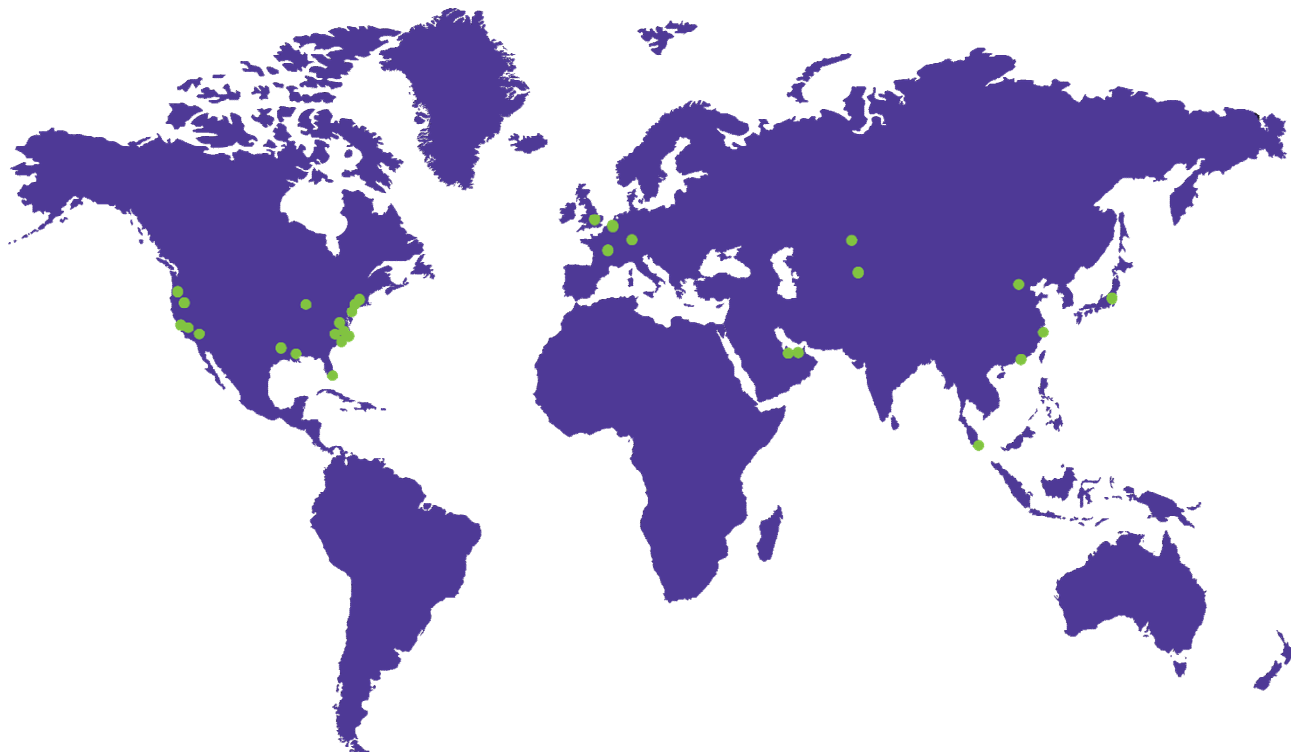
David B. Zelikoff represents and counsels clients in a range of matters related to employee benefit plans and executive compensation agreements. He advises on the design and implementation of tax-qualified, nonqualified deferred compensation, equity compensation, and health and welfare plans, and he helps clients draft and negotiate executive employment agreements, severance arrangements, and change-in-control arrangements. David's clients include tax-exempt organizations, and public/private Fortune 500 and emerging growth companies in the technology and life sciences fields.

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